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REME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 112

AMOS REECE, *Petitioner*

vs.

STATE OF GEORGIA

RIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR PETITIONER

DANIEL DUKE,
301-2 Volunteer Building,
Atlanta, Georgia.

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SUPREME COURT OF THE UNITED STATES

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No. 112

AMOS REECE, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent*

BRIEF OF THE PETITIONER ON THE MERITS.

I.

(a)

Reference to the Official Opinions in the Court Below.

The opinions of the Supreme Court of the State of Georgia under review here are reported in:

(a) 211 Georgia Reports, page 339; 85 S.E. 2nd, page 773, rendered January 10, 1955; rehearing denied February 17, 1955.

(b) 210 Georgia Reports, page 578; 82 S.E. 2nd, page 10, rendered May 11, 1954, which said opinion reversed the trial court and remanded the case for a retrial.

(b)

Statement of the Grounds on Which Jurisdiction Is Invoked.

On June 24, 1954, the petitioner, an illiterate Negro male, of low mentality, was placed on trial in the Superior Court of Cobb County, Georgia, upon an indictment which accused him of the rape of a white female. Before plead-

ing to the merits, a written motion to *quash* the *venire* and *panels of petit* (trial) *jurors* was filed alleging that competent and legally qualified members of the Negro race had been excluded, solely because of their race and color, from the venire and panels of the petit (trial) jurors from which the petitioner would have to select the jury which would try him, and that such discrimination in the composition of the venire and panels of petit jurors violated the rights of the petitioner as secured to him under the 14th Amendment of the United States Constitution. The State filed a written motion to dismiss the plea of the petitioner, and the court below sustained the State's motion and dismissed the plea. This ruling of the trial court was duly appealed to the Supreme Court of Georgia, the highest appellate tribunal of the State of Georgia.

The trial court's dismissal of the petitioner's plea was sustained by the Supreme Court of Georgia, on January 10, 1955; a motion for a rehearing was filed by the petitioner within ten days, and on February 17, 1955, the motion for a rehearing was denied by the Supreme Court of Georgia. Within ninety days after the entry of the judgment of the Supreme Court of Georgia, the petition for certiorari to review the judgment of the Supreme Court of Georgia; together with a motion with petitioner's affidavit attached, to proceed in forma pauperis, was filed in this Court in compliance with Rule 22 and Rule 53.

As a part of the entire proceedings against the petitioner, a ruling and judgment of the Supreme Court of Georgia, rendered on May 14, 1954, when a prior conviction of the petitioner, on the same indictment, was reversed and the case was remanded to the court below for a retrial, must be considered because the Supreme Court of Georgia, in its decision of January 10, 1955, assumed contrary to the facts, contrary to its own opinion of May 14, 1954 and contrary to the record that there had been a prior

adjudication on the issue of the legality of the petit (trial) jury as raised by the petitioner's special plea in abatement timely filed at his second trial on June 24, 1955.

The jurisdiction of this Court is also invoked to review those portions of the opinion of the Supreme Court of Georgia, in its decision of May 14, 1954, when it reversed the petitioner's prior conviction and remanded the case to the court below for a retrial, even though the rulings made therein on the constitutional questions were adverse to this petitioner, and were not appealed at that time to this Court. It is contended that the ruling of the Supreme Court of Georgia on May 14, 1954, denied this petitioner "due process of law" as guaranteed him under the 14th Amendment of the Constitution of the United States, in that said opinion in headnote one thereof refused to consider the merits of a motion to quash the indictment against him because of racial discrimination in the selection of the Grand Jury which indicted the petitioner, on the grounds that the motion to quash was filed too late when filed after the indictment. It is now urged that said ruling deprived this petitioner of his constitutionally guaranteed right to the effective aid benefit of counsel as embraced within "due process", and that since the face of the record disclosed this deprivation of "due process", that this Court in order to facilitate justice and adjudicate all matters that might hereafter arise, now has jurisdiction to and should review and correct the errors here complained of contained in the opinion of the Supreme Court of Georgia, as rendered in this case on May 14, 1954.

The statutory provisions upon which the jurisdiction of this Court is invoked are as follows:

Fourteenth Amendment: Section I:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, U.S.C.A., Section 1257: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes of the United States."

Rule 19, paragraph 1(a): "(a) Where a state court has decided a federal question of substance . . . in a way probably not in accord with applicable decisions of this court."

(c).

The Questions Presented.

(1) Did the petitioner in his special plea filed on June 22, 1954, prior to pleading to the merits on the indictment against him, sufficiently allege and claim the deprivation of his rights under the Fourteenth Amendment of the Constitution of the United States, and should the trial court have permitted the petitioner to have introduced evidence to show that legally qualified and competent members of the Negro race had been systematically and purposely excluded, because of their race and color, from the panels and venire of petit (trial) jurors which were about to be put upon him at his said second trial?

(2). Did the ruling of the Supreme Court of Georgia appearing in #210 Georgia Reports at page 578, headnote 1 thereof, which held that one who was accused of a capital felony and was committed to jail was under a duty to

raise by a proper pleading prior to the indictment the deprivation of his constitutional right to have a grand jury pass upon the charge against him from which members of the Negro race had not been excluded because of their race and color, constitute res judicata on the question of whether or not members of the Negro race had been excluded because of their race and color from the petit jury venire and panels that were being put upon him at his trial?

(3) Does the fact that the petitioner raised questions as to the legality of the jury commission which selected the names of persons whose names were in both the grand jury and petit jury boxes of the County and raised the question of the legality of the grand jury which indicted him in one and the same pleading in which he makes constitutional objections to the composition of the venire and panels of the trial jurors, make his plea subject to dismissal without proof, merely because a great part of the plea may be superfluous?

(4) Were there sufficient allegations in the petition to require proof of the alleged deprivation of a fundamental right arising under the Constitution of the United States?

(5) Could the ruling of the Supreme Court of Georgia in the case of *Reece* vs. *The State*, 210 Georgia, page 578, headnote 1 thereof, operate to prevent the petitioner on a second trial on the same indictment from raising objections, prior to going to trial on the merits of the indictment, to the venire and panels of petit jurors put upon him at his second trial and forever preempt him from abating the trial, regardless of whether or not qualified and competent members of his race had been purposely and systematically excluded from the venire and panels of jurors because of their race and color?

(6) Does the fact that the petitioner at his first trial presented only an objection to the composition of the

grand jury which indicted him, and went to trial on the indictment without making any constitutional objection to the petit jury put upon him, operate as a waiver ad infinitum upon any subsequent retrial upon the same indictment when a different and new venire and panels of trial jurors are put upon him from moving by a timely motion to set aside and quash the venire and panels of petit jurors from which competent members of his race had been purposely excluded because of their race and color?

Subsidiary Questions Comprised Within the Larger Questions and Which It Is Respectfully Submitted Should Be Passed Upon By This Court.

(7) Did the judgment of the Supreme Court of Georgia in the decision of May 11, 1954, in Case No. 18553, 210 Georgia 578, that the petitioner, under the circumstances, filed his motion to quash the indictment too late and that his objections to the grand jurors that returned the indictment should have been presented prior to his indictment, deprive this petitioner of his right to show that there had been systematic and purposeful discrimination against qualified members of his race in the selection of the grand jury, and did the judgment of the Supreme Court of Georgia, in this respect, deprive the petitioner of the right to the effective aid and assistance of counsel in violation of the due process clause of the Fourteenth Amendment?

(8) Is the fundamental constitutional question of race discrimination in the selection of grand jurors, which was raised at his first trial, now closed by virtue of the ruling in the case of *Reece* vs. *The State*, No. 18553, 210 Georgia 578, 82 S.E. 2nd 10, because the petitioner did not appeal the adverse judgment on the federal question to this Court within the ninety day rule? Was the ruling in *Reece* vs.

The State of Georgia, 210 Georgia Reports, page 578, headnote 1 thereof, such a final order and ruling that the same should have been appealed to this Court within ninety days from the rendition thereof?

In a case where a federal question was raised in the trial court and urged on appeal, which is reversed on a question purely a matter of state law and remanded to the trial court for a retrial, does the judgment of the highest State Court on the federal question continue to be such a part of the "whole course of proceedings" against the petitioner, that jurisdiction is retained in this court to review on certiorari the adverse judgment of the State Court on the federal question?

Since the adverse ruling on the federal question raised at the petitioner's first trial constitutes the basis of the State's demurrer to the petitioner's motion raising federal questions at his second trial, does the record and judgment thereby become a part of Case No. 18780, 211 Georgia 339, 85 S.E. 2nd 773, so that this Court must pass upon the fundamental constitutional questions raised at his first trial in order to reach a determination on the constitutional questions raised at his second trial?

(9) Does the evidence presented on the question of discrimination in the composition of the grand jury which was offered and accepted by the Court at the petitioner's first trial in October, 1953, disclose that discrimination had been practiced in selecting the names of persons who composed the grand jury lists of the County, and did the trial court commit error in refusing to quash the said indictment?

(10) If qualified competent Negroes had been for more than thirty years excluded from membership on the jury commission which made up the grand jury and petit jury lists of a county, and that pattern of exclusion had carried

forth into the composition of the jury lists, from which persons were selected to serve on the grand juries and trial juries, may a Negro, accused of a capital felony, raise, by a proper and timely motion such discrimination, and should he be permitted to introduce such evidence as he may have to prove that the selection of the jury commission was tainted with discrimination against members of his race, and that such exclusion from the jury commission was one link in the chain of excluding members of his race from participating in grand jury and petit jury service of the county where he was accused and tried?

(d)

Statement of the Case.

This case arose in the Superior Court of Cobb County, Georgia on an indictment numbered 1961, returned by the Grand Jury on October 23, 1953, which charged the petitioner, a Negro male person, with the offense of rape upon a white female person on October 20, 1953. Petitioner was arrested and incarcerated on October 20, 1953 for said offense. On October 24, 1953, the Court appointed two local attorneys to represent the petitioner at his said trial.

Prior to the petitioner pleading to the merits on the aforesaid indictment, on October 30, 1953 he filed a motion, (R-1-3). The Court entertained said motion, and after hearing evidence submitted showing that members of the Negro race had been systematically and purposely excluded because of their race and color from the grand jury that had indicted the petitioner, the Court overruled the motion, and the petitioner was tried on October 30, 1953 on the merits of said indictment, was found guilty by the jury and sentenced by the Court to be electrocuted.

The verdict and judgment of the Supreme Court of

Georgia, the highest appeals tribunal in the State, and being therein numbered 18553, is officially reported in =210 Georgia Reports, page 578, 82 S.E. 2nd, page 10, (R-16-17).

The verdict and judgment of the trial court was reversed, and the petitioner was remanded to be retried upon the same indictment, the said reversal being decided on May 11, 1954, (R-16).

The ruling and judgment of the trial court on the petitioner's motion to quash the aforesaid indictment was included in the appeal and was determined adverse to the petitioner in Headnote =1 of the decision appearing in =210 Georgia Reports, page 573, (R-16). The Supreme Court of Georgia did not consider the evidence submitted by the petitioner upon said motion, but ruled that the motion to quash the indictment brought by the petitioner should have been brought prior to his indictment and that his motion to quash the indictment came too late where the same was brought after the indictment, (R-16).

This ruling of the Supreme Court of Georgia was not appealed to the United States Supreme Court, and it is contended that this ruling constituted part of the whole proceedings against this petitioner and that this Court now has jurisdiction to pass upon the sufficiency of the evidence submitted as to the exclusion of members of the Negro race from the grand jury lists of said County and from the grand jury which indicted the petitioner and to review and to reverse Headnote 1 of the case of *Reece* vs. *The State* in =210 Georgia Reports at Page 573, for the reason that said ruling denied this petitioner the right and benefit of counsel as the same is embraced in the Fourteenth Amendment of the United States Constitution.

The petitioner was retried on June 22, 1954 on the afore-

said indictment in said County. Prior to pleading to the merits at his second trial which was had on June 22, 1954, the petitioner who had a different attorney at his second trial, filed a special plea in abatement, wherein he sought to quash the venire and panels of petit jurors being put upon him at his said second trial for the reason that there were no members of the petitioner's race on the venire and panels of jurors being put upon him and because members of the Negro race had been systematically and purposely excluded from the lists of petit (trial) jurors in said County, (R-18-23).

In response to the petitioner's written plea in abatement, the State filed a demurrer, (R-23). The said demurrer incorporated both a general demurrer, a plea of res judicata and a plea that the petitioner had waiver his right to challenge by a proper motion the exclusion of members of his race from the trial jury lists of the County, (R-23-26).

The Court, after hearing arguments from both the State and the petitioner, sustained the demurrer and denied the motion; (R-26).

The petitioner was retried upon the merits of the aforesaid indictment on June 22, 1954 in Cobb County and was found guilty by the jury and was sentenced by the Court to be electrocuted. The petitioner appealed the said verdict and sentence to the Supreme Court of Georgia, the highest appeals tribunal in the State of Georgia, the said appeal being numbered in said Court 18780, and appearing in 211 Georgia Reports at page 339, 85 S.E. 2nd, page 773, and the same was decided on January 10, 1955, rehearing being denied on February 17, 1955, (R-26-27).

The case is before this Court in order to correct the alleged errors affecting rights of this petitioner arising under the Fourteenth Amendment of the Constitution of

the United States as said errors are embraced in Headnotes 1 and 2 of the decision of the Supreme Court of Georgia in 211 Georgia Reports, page 339, 85 S. E. 2nd, page 773 (R-26-27).

(c)

Argument and Citation of Authorities.

The petitioner herein does not contend that he has a right arising under the Fourteenth Amendment of the United States Constitution to have members of the Negro race proportionately represented on the grand jury lists of the County in which he was tried or on the trial jury lists of the County in which he was tried.

The petitioner does contend that the Fourteenth Amendment gives him the right to have members of the Negro race on the particular trial jury which tried him. He does not contend that he has a right arising under the Constitution to have a Negro included in the venire and panels of trial jurors put upon him for trial.

The petitioner does contend that the Fourteenth Amendment of the Constitution of the United States protects him against discrimination against qualified Negro citizens in denying them the right and privilege of participating in the administration of the law, as jurors (either as grand jurors or petit jurors), because of their race and color. Petitioner contends that where prior to going to trial on an indictment charging him with a capital felony for the commission of an offense upon a white female, he, in writing, alleged that no member of his race was on the venire and panels of petit jurors about to be put upon him and that members of his race had been excluded from the venire and panels of petit jurors by the officials of the County arbitrarily and discriminatorily because of their race and color, that he was entitled to prove his said allegations and that it was a denial of his rights under the Fourteenth

Amendment of the United States Constitution for the trial court to dismiss his said plea without hearing evidence.

Carter v. *Texas*, 177 U.S. 445, at page 450
Rogers v. *Alabama*, 192 U.S. 226.
Martin v. *Texas*, 200 U.S. 316.
Norris v. *Alabama*, 294 U. S. 587.
Patton v. *Mississippi*, 332 U.S. 463.
Cassell v. *Texas*, 339 U.S. 291.

Where one files a plea setting forth that a fundamental requisite arising under the Constitation of the United States is lacking in the mode and method by which he is being brought to trial, it is for the United States Court to determine whether the pleadings are sufficient to withstand a general demurrer, or whether the party has waived his right to attack the method and manner of procedure, or whether the matter has been previously adjudicated.

U. S. v. *Gale*, 109 U.S. 65.
Hale v. *Commonwealth of Kentucky*, 303 U. S. 613.

The petitioner by his plea challenging the array of petit jurors which were put upon him set out specifically that members of the Negro race who were otherwise qualified and competent to be jurors had been purposely discriminated against by those who compiled the lists of jurors in the County where he was tried and tried for a capital felony. The venire and panels of petit jurors which were put upon the petitioner at his second trial on June 22, 1954 was a new, separate and distinct venire of jurors. Never before at any previous trial had on the same indictment was the petitioner confronted with those panels of jurors. According to Georgia procedure, the jurors put upon him at his second trial had been drawn from the jury box ten days prior to June 22, 1954, and had been summoned to appear for jury duty for the week of June 22,

1954. It is respectfully urged that the petitioner could not have ever at any time waived his right to assert his rights under the Fourteenth Amendment to question the validity of these panels of petit jurors. It is respectfully urged that the adjudication of his rights at his trial in October, 1953 on the same indictment could not be res judicata upon the questions raised as to the legality of the petit jury which was being put upon him when the indictment was called for trial on June 22, 1954.

In adjudicating the petitioner's rights to have an indictment returned against him, by a grand jury composed of persons from which legally qualified and competent members of the Negro race had not been excluded because of their race and color, which he had raised by plea at his trial upon the same indictment in October, 1953, the Supreme Court of Georgia did not consider the evidence which was submitted upon that question. The Supreme Court in adjudicating upon that question in its opinion of May 11, 1954 (R-16-17) held that he brought the motion to quash the indictment too late. They therefore did not examine the record of the evidence that was before them that was submitted as to the discrimination. The said evidence, in order to exemplify the fact that the Court did not consider it and because it is contended that this Court should now pass upon the evidence submitted upon the motion to quash, is set out in the record (R- 4-14). The petitioner was arrested in the late afternoon of October 20, 1953. An indictment was returned by the Grand Jury on October 23, 1953. Local attorneys were appointed to represent the petitioner on the afternoon of October 24, 1953. The Supreme Court of Georgia in the aforesaid opinion has ruled that in order to test the legality of the grand jury which returned the indictment, this petitioner

should have objected prior to the indictment, at a time when he did not have counsel and at a time when he was incarcerated in the jail in Cobb County, Georgia. The facts here need no elaboration. The opinion of the Court that the petitioner's motion to quash was filed too late is a clear denial of due process of law to this petitioner and is also a denial of petitioner's right to the aid, assistance and benefit of counsel as is embraced within the due process clause of the Fourteenth Amendment of the United States Constitution.

Palko v. *Connecticut*, 302 U.S. 319, at page 324 and 325.
Williams v. *Kaiser*, 323 U.S. 475.
Malinski v. *New York*, 324 U.S. 416.

Where an illiterate Negro of low mentality is incarcerated in the jail and where an all-white grand jury indicts him at a time when he does not have legal council, it is urged that he is denied one of the essential elements of procedural due process if a court after indictment denies him the right to assert and prove that a fundamental requisite under the United States Constitution was lacking in the method and procedure by which he was indicted. The aid and assistance of counsel implicit in the due process clause must of necessity mean advice, aid and assistance of counsel at every step of the proceeding which finally and ultimately condemns the person. The selection of a jury list from which names are drawn for the selection of a grand jury is just as much an essential element of a criminal prosecution for a capital felony in Georgia as the trial itself. Therefore, to rule that this illiterate Negro of low mentality who was incarcerated in jail and who did not have an attorney must have raised prior to his indictment the question of discrimination against members of his race is contrary to the Fourteenth Amendment of the

Constitution of the United States and in conflict with many decisions of this Court.

U. S. v. *Gale*, 105 U. S. 65 and 66;
Powell v. *Alabama*, 278 U. S. 69;
Maliński v. *New York*, 324 U. S. 416 and 417.

There was raised in the plea challenging the array of petit jurors put upon the petitioner at his second trial had on June 22, 1954, the question of the pattern of discrimination practiced in the composition of the jury lists of the County as a whole.

It was alleged that there were at least one hundred members of the Negro race legally qualified and competent to serve as jury commissioners in the County, but that none had ever been appointed to serve and that members of the Negro race had been excluded from membership on the commission because of their race and color and that this discrimination against members of his race tainted the whole lists of grand jurors and petit jurors in the County.

This is a question that must ultimately be answered. Those in this region familiar with the modes of thought and action that exist in actuality beneath the abstract law—law and procedure in action—know that Negroes will never participate in the administration of justice on an equality with white persons, until their race is represented on the commissions and boards that select the persons to perform jury duty. The grovelling abasement of our legal system in the rural counties of the South to the worst element of the race demagogue will never end until the Negro takes his place on the boards of jury commissioners who select the names of persons who are subject to jury duty. The question is open in this case—it is open on a ruling on a demurrer. It is therefore presented as an abstract legal question. Does the Fourteenth Amendment (due process and equal protection clauses) extend far enough to embrace

the composition of the board or commission which selects the names of the persons who appear in the jury boxes of a particular jurisdiction?

May a Negro person charged with a capital felony, assert his right under the United States Constitution by a timely motion to test the legality of the grand jury and petit jury because they are composed of persons selected by a board or commission from which legally qualified and competent members of his race have been systematically and arbitrarily excluded because of their race and color?

May he assert this discrimination as a part of a whole pattern of discrimination—as in this case it was sought to do? It was no accident that only six Negro names appeared out of 2,750 names in the Grand Jury and Petit Jury Boxes. It was no accident that three of the Negroes were beyond eighty years of age—two of them deaf and sick. It was no accident that the other three were beyond sixty years of age and one of them did not live in the County and was therefore not legally qualified.

Those facts emphasize the necessity of having a jury commission from which Negroes have not been excluded solely because of their race and color.

This Court has recognized this problem in a case coming up from the State of Texas, where the jury commission system is used in selecting grand and petit jurors. The systems in Texas and Georgia are similar.

Hernandez v. Tex., 347 U. S. 475, 96 L. Ed. 868.

This petitioner respectfully contends that he had a right under the Fourteenth Amendment of the Constitution, the "equal protection clause", to be tried by a jury from which members of his race had not been systematically excluded because of their race. He was prevented from proving by evidence such exclusion from the jury which tried him, by

a ruling of the trial court, which dismissed a timely challenge to the array of petit jurors. It is urged that the court erred and that the conviction should be reversed and remanded with proper instructions.

It is also contended that this petitioner was denied the right and benefit of counsel as the same is embraced in the "due process clause", at his first trial on the same indictment, when the Supreme Court ruled that a motion to quash the indictment was too late if filed after the indictment—and that the fact that the petitioner was in jail and without a lawyer did not relieve him of claiming his Constitutional right to be indicted by a grand jury from which members of his race were not excluded because of their race before the said grand jury returned the indictment.

It is further contended that the evidence which was submitted on the motion to quash the indictment on October 24, 1953, as incomplete as it is, was sufficient to show deliberate and systematic exclusion and discrimination against members of the Negro race.

Respectfully submitted,

DANIEL DUKE,
Counsel for Petitioner.

September 19, 1955. 301-2 Volunteer Building, Atlanta 3, Georgia.